



# California Fair Political Practices Commission

December 6, 1989

Robert Henderson  
City Attorney  
450 Latham Avenue  
Hemet, CA 92343

Re: Your Request for Advice  
Our File No. A-89-303

Dear Mr. Henderson:

You have requested advice on behalf of Mayor Ken Nishino concerning application of the conflict-of-interest provisions of the Political Reform Act (the "Act")<sup>1</sup> to his duties as the Mayor of the City of Hemet. The following advice is based upon the facts provided in both of your letters, the January 25, 1989 and June 19, 1989 reports by Mark Goldberg, and Mr. Goldberg's letter of September 14, 1989.

## QUESTION

May Mayor Nishino participate in the development of the specific plan for the McSweeny Ranch West project, since he owns property within one mile from the project?

## CONCLUSION

Since the phased implementation of the specific plan for the McSweeny Ranch West project calls for the proposed construction of a street immediately adjacent to Mayor Nishino's property, he may not participate in any decisions regarding the specific plan for McSweeny Ranch West.

## FACTS

The City of Hemet is considering specific plan developments for the McSweeny Ranch West project. This project involves 780

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<sup>1</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

acres, which will consist of 543 acres of residential development, 8 acres of commercial development, 184 acres of open space and 4 acres for circulation.

Mayor Nishino owns 10 acres of property which is located beyond a radius of 2,500 feet and within one mile from the project. The mayor's interest in this property, which is currently zoned agricultural-residential, exceeds \$1,000. The mayor's property fronts to Lyon Avenue, which is a direct access to the McSweeney West project. Lyon Avenue is a dirt, unimproved road which runs in a north-south direction between Newport Road on the south and intersects with what is designated as Thornton Avenue on the north. Thornton Avenue forms the northern boundary and Lyon Avenue forms the western boundary of the McSweeney Ranch West project.

Mayor Nishino has disqualified himself from participating in previous city council decisions regarding the McSweeney West project because, in his view, the size of the project creates a foreseeability that development could require the improvement of Lyon Avenue. Such improvement would directly benefit all the properties fronting Lyon Avenue.

You have provided us with a copy of a report from Mr. Mark Goldberg, the city's Director of Community Development, dated June 19, 1989. Mr. Goldberg outlined the McSweeney Ranch West findings and conditions related to Lyon Avenue. He noted that specific improvement of Lyon Avenue is required only to the portion that borders McSweeney Ranch. However, the traffic study for McSweeney Ranch, dated September 30, 1988, recommended off-site improvements to mitigate the impact of the McSweeney project on traffic circulation. For example, page 43 of the traffic study states that:

The project should also participate in a comprehensive improvement program for Southwest Hemet which will result in the phased implementation of roadways depicted on Figure 8.

Figure 8 depicts the southwest Hemet roadway corridors and classifies the proposed construction of Lyon Avenue fronting the mayor's property.

Mr. Goldberg also prepared a report regarding the zone change for the McSweeney Ranch West project, which was presented to the Planning Commission on January 25, 1989. The McSweeney Ranch specific plan constitutes a "special development proposal", which is being jointly master-planned by the city and the property owner. It was recommended to the Planning Commission, as a condition for approval, that the McSweeney Ranch project participate in the provision of a significant amount of off-site transportation facilities (roadways, additional travel lanes, signals, etc.) as well as participate in a comprehensive improvement program resulting in the phased implementation of roadways necessary to

accommodate traffic generated by cumulative development of the area. Some of the proposed improvements include a drainage bridge on Lyon Avenue at Salt Creek, the construction of Lyon Avenue as an 88 foot right-of-way, and numerous traffic signals along Lyon Avenue. All of these proposed improvements are within one mile of the mayor's property.

It was also recommended that the McSweeny Ranch project contribute their pro-rata share to participate in future assessment programs for the provision of future regional drainage facilities. This would include a drainage bridge within one mile from the Mayor's property.

For purposes of our analysis, you have requested advice and guidance under Regulation 18702.3(a)(2).

#### ANALYSIS

The Act prohibits a public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. (Section 87100.) A public official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his immediate family or on, among other things:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

(b) Any real property in which the public official has a direct or indirect interest worth one thousand dollars (\$1,000) or more.

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

(Section 87103.)

As the Mayor of the City of Hemet, Mr. Nishino is a public official. (Section 82048.) Therefore, he may not participate in a decision if it is reasonably foreseeable that the decision will

have a material financial effect on any real property in which he has an interest of \$1,000 or more. (Section 87103(b).) Mayor Nishino is required to disqualify himself from participating in any decisions regarding the specific plan developments for the McSweeny Ranch West project if such decision will foreseeably and materially affect his property.

#### Foreseeability

The effect of a decision is reasonably foreseeable if there is a substantial likelihood that it will occur. To be foreseeable, the effect of a decision must be more than a mere possibility; however, certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; In re Thorner (1975) 1 FPPC Ops. 198.) The Act seeks to prevent more than actual conflicts of interest; it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822.

#### Materiality

The Commission has adopted several regulations defining material financial effect. Regulation 18702.3 (copy enclosed) contains the guidelines for determining if the effect of a decision is material when an official's ownership interest in real property is indirectly involved in the decision<sup>2</sup>. You have specifically requested advice under Regulation 18702.3(a)(2), which provides that the effect of a decision is material if:

(2) The decision involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the real property in which the official has an interest will receive new or substantially improved services.

If the development of the specific plan for the McSweeny Ranch West project expressly includes the improvement of Lyon Avenue immediately adjacent to the mayor's property, the effect is material under Regulation 18702.3(a)(2), because the decision involves the construction of streets.

Conversely, under most circumstances, if the specific plan does not expressly involve the construction of an improved street adjacent to the mayor's property, but merely makes it a foreseeable possibility, Regulation 18702.3(a)(2) is not the appropriate standard for determining materiality.

As stated above, the specific plan requires the improvement of Lyon Avenue for that portion which borders McSweeny Ranch. Under the conditions of approval for the specific plan, (report

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<sup>2</sup> You have indicated that Mr. Nishino's property is not directly involved in the decision, as defined in Regulation 18702.1(b).

dated January 25, 1989), Condition 7 was imposed to mitigate the impact of increased traffic from the McSweeny Ranch project. This condition states that the "developer shall participate in a comprehensive improvement program for Southwest Hemet which will result in a phased implementation of roadways as shown on figure 8 of the traffic study report..."

Furthermore, the traffic study report states that:

The project should also participate in a comprehensive improvement program for Southwest Hemet which will result in the phased implementation of roadways depicted on Figure 8.

The figure 8 report calls for the proposed construction of Lyon Avenue (in front of the mayor's property) as a 88 foot right-of-way. Therefore, under the phased implementation of roadways, Lyon Avenue will be improved from a dirt road to a paved roadway. In addition, a drainage bridge and numerous traffic signals are also proposed.


Since the specific plan incorporates a "special development proposal" which ultimately calls for the improvement of Lyon Avenue in front of the mayor's property, Regulation 18702.3(a)(2) must be applied. With the phased implementation and comprehensive improvement program for Southwest Hemet, the Mayor's property will receive new and improved services as a result of the development of the McSweeny Ranch West project.

Pursuant to Regulation 18702.3(a)(2), the adoption of the specific plan for the McSweeny Ranch West project will have a material financial effect on the mayor's property, and therefore, he may not participate in any decisions regarding the specific plan for McSweeny Ranch West.

I trust that this answers your question. If you have any further questions regarding this matter, please contact me at (916) 322-5901.

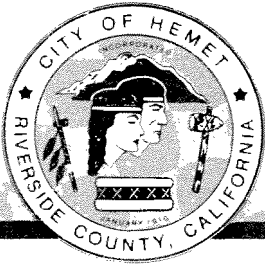
Sincerely,

Kathryn E. Donovan  
General Counsel

By:  Jill R. Stecher  
Counsel, Legal Division

KED:JRS:plh

Enclosure



# City of Hemet

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450 EAST LATHAM AVENUE • HEMET, CALIFORNIA 92343 • (714) 658-9411

September 14, 1989

Ms. Jill Stecher  
c/o Fair Political Practices Commission  
428 "J" Street, Suite 800  
Sacramento, CA 95814

Dear Ms. Stecher:

This report is provided for your use to clarify traffic issues which we discussed related to Lyon Avenue resulting from traffic generated by the proposed McSweeny Ranch Planned Community.

Lyon Avenue is designated as a Secondary Highway (88-foot right-of-way) on the City's General Plan Circulation Element. It is currently improved to its ultimate width between Stetson Avenue and Chambers Avenue. South of Chambers Avenue it is unimproved dirt to Newport Road. As development takes place adjacent to streets shown on the General Plan Circulation Element, the developer is required to dedicate and improve the portion of these streets adjacent to his development. Street improvements off-site are generally not required. In the case of the McSweeny Ranch, during the study of environmental impacts, the large volume of traffic generated by the project was determined to have significant impacts on other roadways which the traffic would utilize in the vicinity (Figure 8). Condition No. 7 of the Specific Plan approval consideration (Report dated January 25, 1989), was imposed to mitigate this impact. The intent of the condition is for the developer to contribute his fair share towards the mitigation of impacts to other roads in the vicinity based on the extent that his project creates additional burdens on those roads.

The McSweeny Ranch project is anticipated to generate traffic as shown in the following exhibits from the traffic study by Kunzman and Associates, dated September 30, 1988: Figure 4, Figure 7, 8, 9, 10, 11, 12, 13, 14 and 15.

The distribution of traffic, as shown in the above exhibits, represents 5% of the project traffic exiting onto Lyon Avenue, south of the project. This represents 1,605 daily vehicle trips. The design capacity of Lyon Avenue (fully-improved) based on the General Plan, is 20,000 vehicle trips per day. The McSweeny Ranch project would utilize 8% of the total design capacity and 5% of the maximum capacity. Based on Condition No. 7 mentioned earlier, the maximum that the McSweeny Ranch developer could be charged for Lyon Avenue improvements between the project and Newport Road based on his fair share, would be 8% of the improvement cost.

Also note per the attached parcel information, that Ken Nishino is not listed as the owner of the subject property, his son Gilbert is the listed owner.

Sincerely,

Mark Goldberg  
Director, Community Development

MG/lb

Attachments: Aerial map  
Exhibits



# California Fair Political Practices Commission

May 23, 1989

Robert T. Henderson  
City Attorney  
450 East Latham Avenue  
Hemet, CA 92343

Re: Letter No. 89-303

Dear Mr. Henderson:

Your letter requesting advice under the Political Reform Act was received on May 19, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jill Stecher an attorney in the Legal Division, directly at (916) 322-5901.

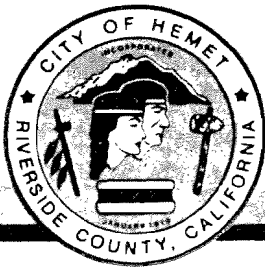
We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Kathryn E. Donovan  
General Counsel

KED:plh



# City of Hemet

450 EAST LATHAM AVENUE • HEMET, CALIFORNIA 92343 • (714) 658-9411

From the Office  
of the  
CITY ATTORNEY

May 15, 1989

Fair Political Practices Commission  
428 J Street, Suite 800  
P. O. Box 807  
Sacramento, California 95804-0807

Attention: General Counsel - Legal Division

Reference: Advisory Opinion - Mayor Ken Nishino

Gentlemen:

Please be advised that I have been requested by Hemet's Mayor, Ken Nishino, for an advisory opinion concerning the following fact situation.

The City of Hemet, a general law city with a five-seat City Council, is considering specific plan developments for the McSweeney West and McSweeney East projects. An overview of the statistics on these projects is as follows:

McSweeney West - 780 acres with 543 acres devoted to all types of residential development which will include 3,900 units, 8 acres of commercial, 184 acres of open space and 4 acres for circulation

McSweeney East - 673 acres which is planned to generate 2,492 residential units on 407 acres, 40.4 acres of hillside natural area, 161.3 acres of open space, and 20 acres of commercial

The current population of Hemet is approximately 33,000.

I am enclosing a map wherein the McSweeney West project is highlighted in red, the McSweeney East project is highlighted in green, and Mayor Ken Nishino's real property is colored in a lighter shade of green. The Mayor's property is 10 acres currently zoned agricultural-residential, which fronts on Lyon Avenue, which is

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Page 2

currently just across the street from the city limits. Lyon Avenue is a dirt road between Newport Road on the south and what is designated as Thornton Avenue on the north. The Mayor's interest in the real property exceeds \$1,000.

In previous City Council actions on the McSweeney West project (McSweeney East has not yet been considered) Mayor Nishino has disqualified himself pursuant to the provisions of Government Code Section 87103, which requires such disqualification in the event the Mayor sees action on the project as having a material financial effect on his property, distinguishable from its effect on the public generally. Although his property is approximately one mile from either of the McSweeney projects, in his view, the size of the projects creates a foreseeability that development could require the improvement of Lyon Avenue from its current dirt condition to paved. That improvement would directly benefit all properties fronting Lyon Avenue, as opposed to the public in general.

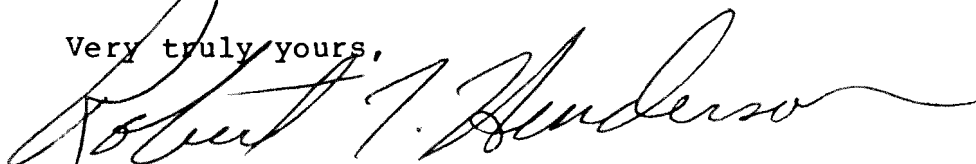
When the Mayor disqualified himself from consideration of the McSweeney West project, the remaining four members of the Council deadlocked with a 2 - 2 vote on the issue of amending the current General Plan which is a necessary early step for the ultimate approval of the project. Because of the deadlock, the Mayor has experienced considerable pressure to reevaluate his declared conflict.

I have previously advised the Mayor that if there is any question in his mind concerning the issue of his declared conflict, your agency could evaluate the issue. In that light, it will be appreciated if you will review this situation and advise concerning your opinion.

If you need additional information, please let me know at your earliest convenience.

Thank you very much for your assistance in this regard.

Very truly yours,

A handwritten signature in cursive script, reading "Robert T. Henderson".

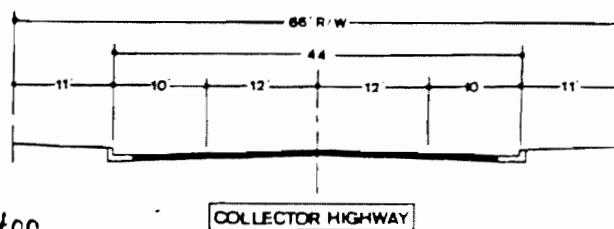
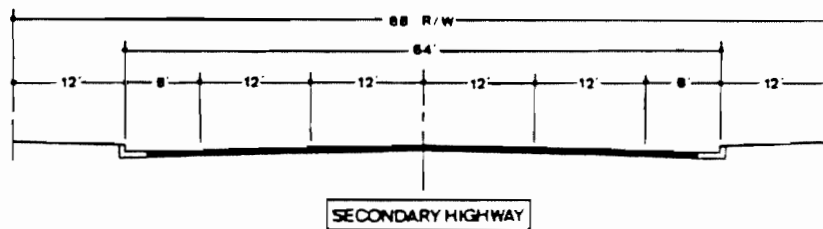
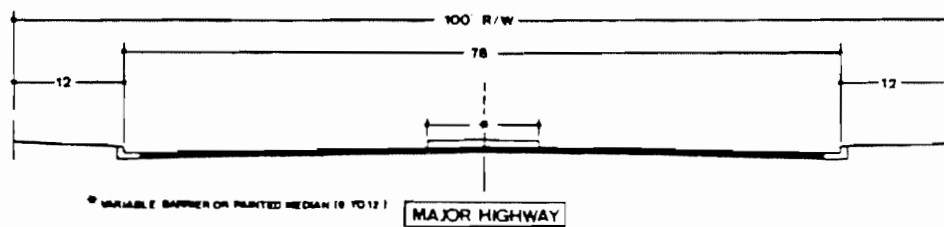
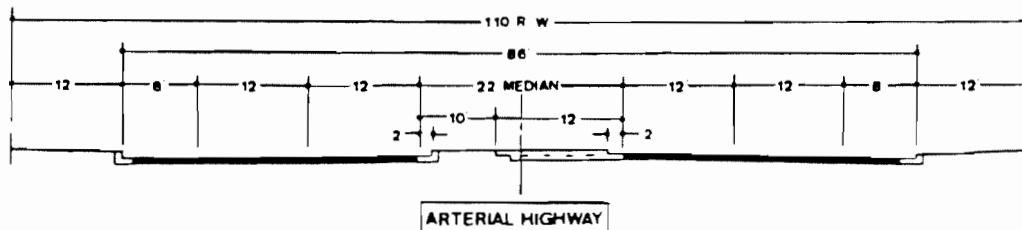
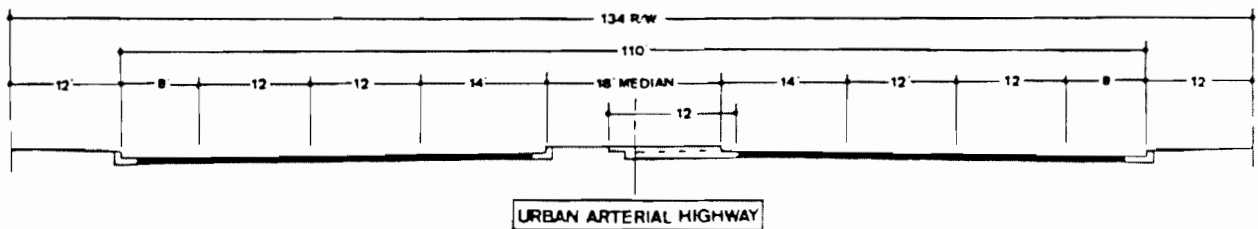
Robert T. Henderson  
City Attorney

/pn

cc Mayor Nishino



**Figure 7**  
**Typical Cross-Sections**  
**Riverside County Plan of Streets and Highways**



Kunzman Associates

# Figure 9

## McSweeny Ranch Zone 1 Traffic Distribution

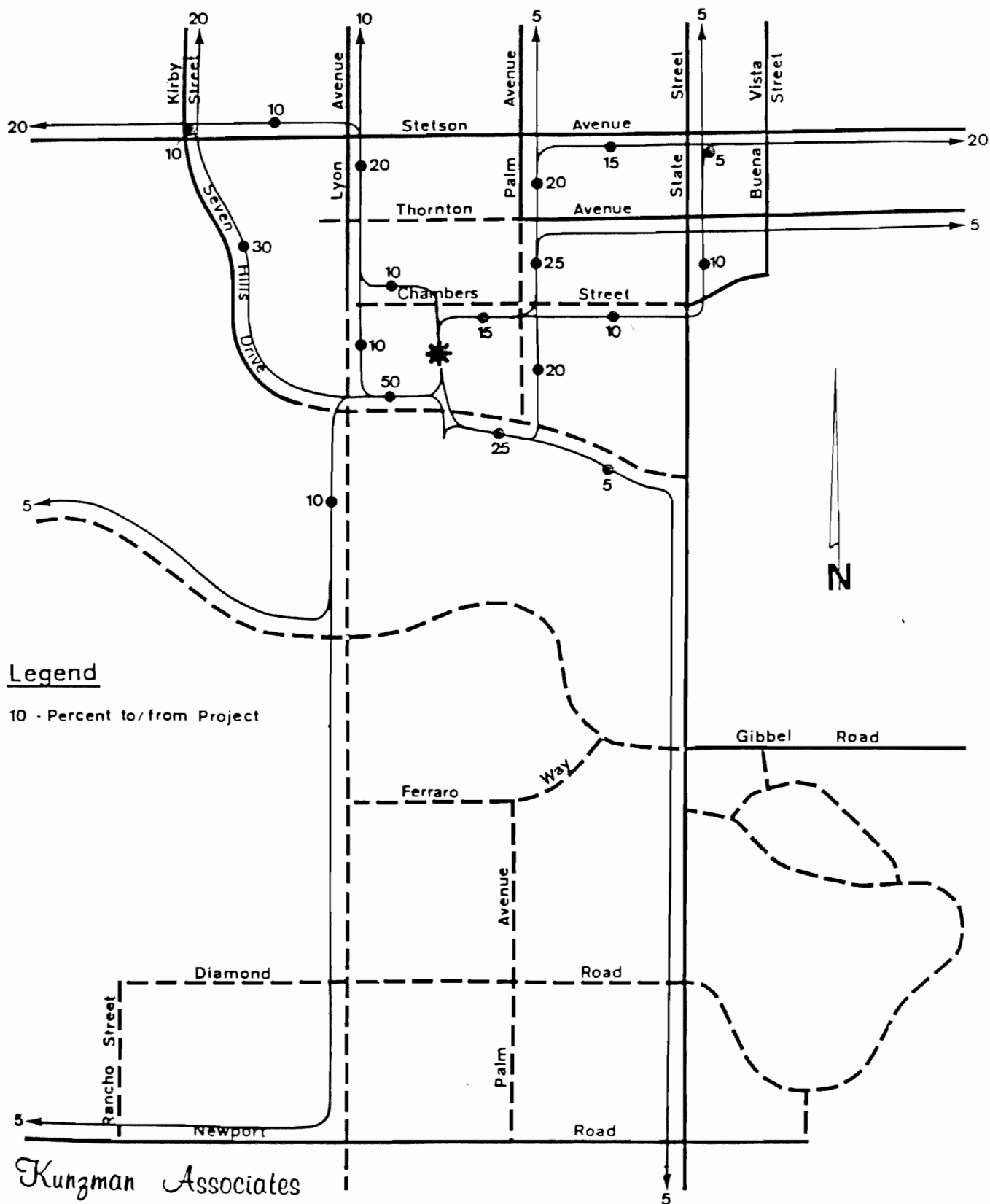
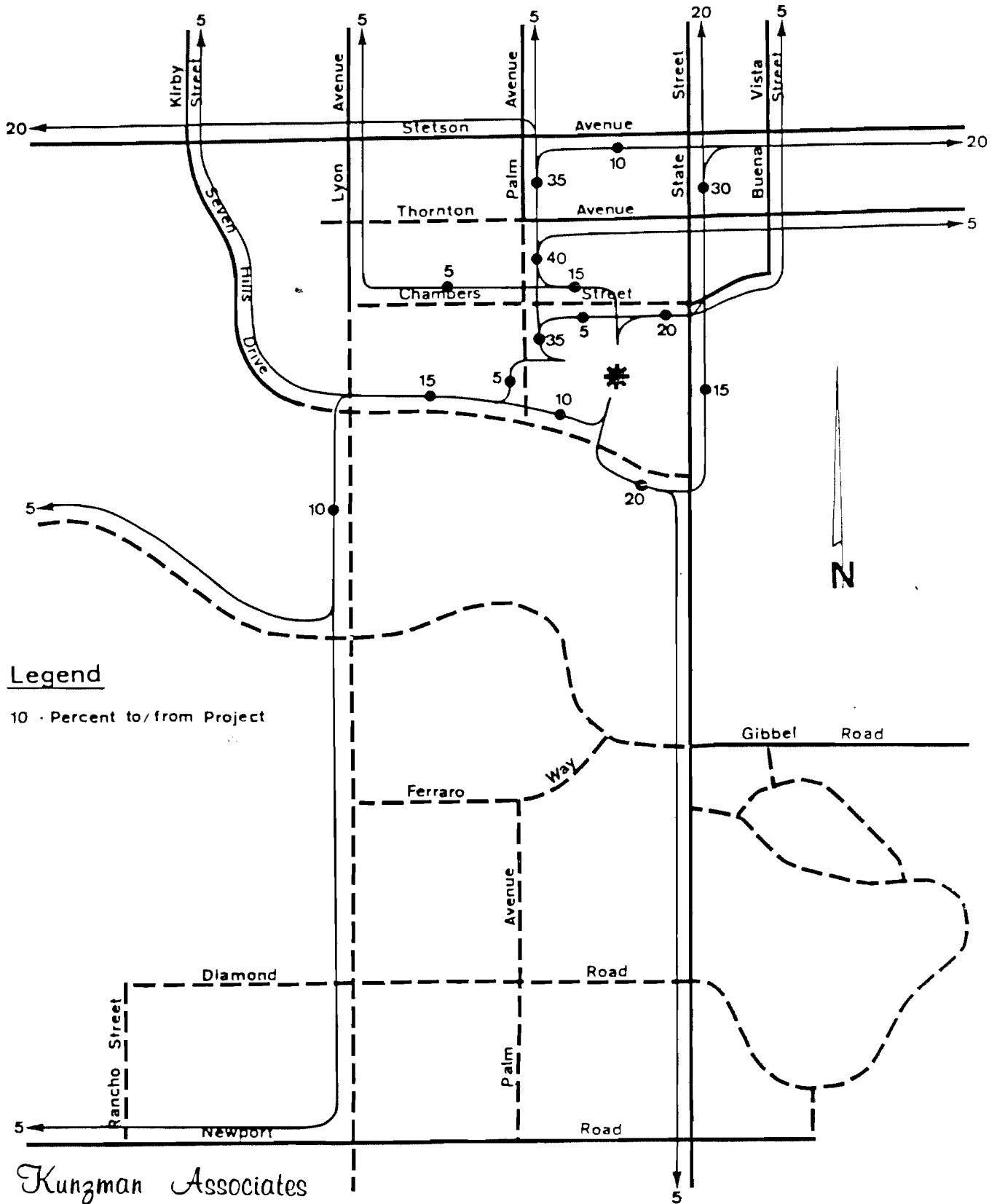


Figure 10

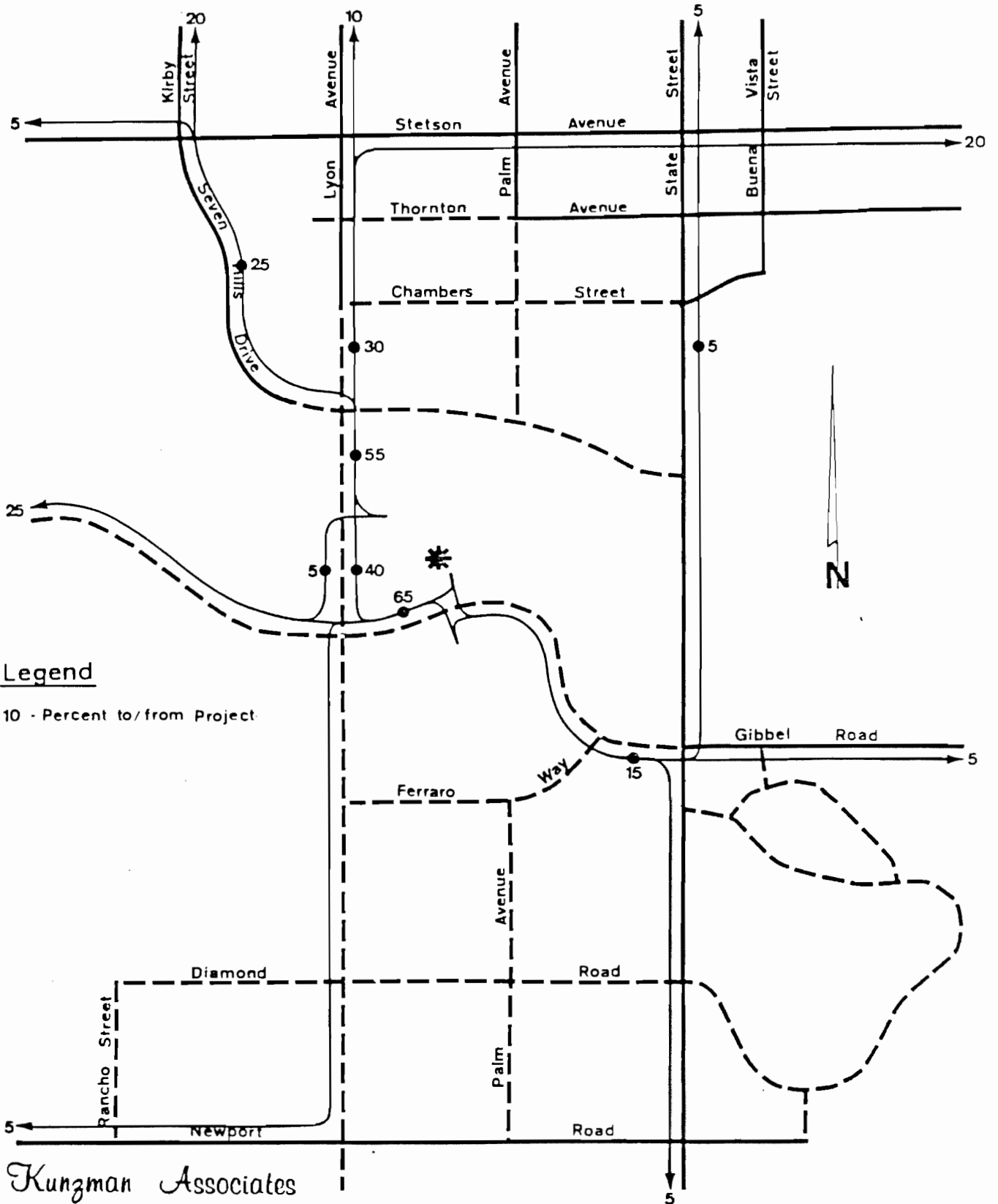
# McSweeny Ranch Zone 2 Traffic Distribution



Kunzman Associates

Figure 11

McSweeny Ranch Zone 3 Traffic Distribution





# City of Hemet

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450 EAST LATHAM AVENUE • HEMET, CALIFORNIA 92343 • (714) 658-9411

September 14, 1989

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Mark Goldberg

Director, Community Development

MG/lb

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